INDEX

TABLE OF AUTHORITIES

CASES Page

FEDERAL STATUTES

CALIFORNIA CONSTITUTION AND STATUTES

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 71-1182

RAYMOND MATTZ,
PETITIONER

v.

G. RAYMOND ARNETT, AS DIRECTOR OF THE DEPARTMENT OF FISH AND GAME OF THE STATE OF CALIFORNIA,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FIRST APPELLATE DISTRICT

PETITIONER'S REPLY BRIEF ON THE MERITS

ARGUMENT

I

TERMINATION REQUIRES SPECIFIC STATUTORY LANGUAGE SHOWING AN END TO RESERVATION STATUS, NOT JUST A PROVISION FOR GOVERNMENT SALES OF UNALLOTTED, INDIAN-OWNED LAND

According to Respondent, the combination of allotments and public sales of unalloted land shows a Congressional intent to terminate an Indian reservation. (Respondent's Brief at 3-5.) California considers specific language of termination unnecessary. (Respondent's Brief at 20.)

The law is to the contrary.

A. Allotment Creates No Presumption Of Termination.

Congress did not regard allotment as extinguishing an Indian reservation in 1892 and does not today.

> "The purpose of the allotment system was to protect the Indians' interest and to prepare the Indians to take their place as independent, qualified members of the modern body politic.'" (Squire v. Capoeman, 351 U.S. 1, 9 (1955), quoting Board of County Commissioners of Creek County v. Seber, 318 U.S. 705, 715 (1943); see also Poafpybitty v. Skelly Oil Co., 390 U.S. 365, 369 (1968).)

Allotment was only one step toward ultimately "assimilating the Indians through dissolution of tribal governments and the compulsory individualization of

Indian land." (Seber, supra, at 716.) Trust allotments were to be a "period of transition." (Ibid.)[1] "The [general allotment] act of 1887..., clearly, does not...abolish the [allotted] reservations."[2]

1. The transition to assimilation has been suspended if not actually ended.

The trust period for allotments was originally 25 years. (25 U.S.C. §348.) It has been repeatedly extended pursuant to 25 U.S.C. §§348 and 391. It has even been reimposed when accidently allowed to lapse. (25 U.S.C. §348a.)

The forced dissolution of tribal governments has also been abandoned. A California reservation cannot be terminated unless its Indians consent. (72 Stat. 619, as amended by 78 Stat. 390.) The pro-termination views expressed in H.Con.Res. 108 (83d Cong., 1st Sess. 1953) were only the views of that Congress. Being a concurrent resolution H.Con.Res. 108 died with the Congress that passed it, as was acknowledged by Secretary of the Interior Stuart Udall in a letter of April 15, 1961, to Richard Schifter, General Counsel, Association on American Indian Affairs. (A copy of that letter is Appendix A to this reply brief.) President Nixon repudiated termination in his Message To Congress On Indian Affairs of July 8, 1970. (6 Weekly Compilation of Presidential Documents 894, 895-896 (July 13, 1970).) See also 25 U.S.C. §§476, 477.

2. The Act of June 17, 1892, specified that allotments on the lower twenty miles of the Hoopa Extension were to be made in accordance with the general allotment act of 1887.

(United States v. Celestine, 215 U.S. 278, 287 (1909).)

Congress reaffirmed Celestine's view of allotment in 18 U.S.C. §1151. Section 1151 specifies that Indian country includes "all land within the limits of any Indian reservation...not withstanding the issuance of any patent."

B. Government sales of Unalloted Indian-Owned Land Create No Presumption Of Termination.

Seymour v. Superintendent, 368 U.S. 351 (1962), recognizes no inconsistency between a reservation's existence and a statute directing the United States, acting as trustee for that reservation's Indians, to sell "surplus" reservation land to non-Indian homesteaders. Indeed Seymour ruled, on the basis of 18 U.S.C. §1151(a), that Congress anticipates non-Indian ownership of land within reservations. (Id. at 358.)

California nevertheless argues that non-Indian homesteading "strongly militates against a continuation of...reservation status." (Respondent's Brief at

3.) The contention is premised on a statement in United States v. Celestine, 215 U.S. 278 at 285, that "reservation" describes an area "which Congress has reserved from sale."

Celestine was just describing how a reservation is created. The next sentence states:

> "When Congress has once established a reservation, all tracts included within it remain a part of the reservation until separated therefrom by Congress."

Celestine thus creates no presumption contrary to 18 U.S.C. §1151(a) and the holdings of Seymour, supra.

C. Termination Requires Specific Statutory Language Showing An End To Reservation Status.

A clear expression of Congressional intent is necessary to remove land from an Indian reservation. (United States v. Celestine, supra, 215 U.S. 278, 290-291; cf. Squire v. Capoeman, supra, 351 U.S. 1, 6-7; Alaska Pacific Fisheries v. United States, 248 U.S. 78, 89 (1918); Choate v. Trapp, 224 U.S. 665, 675 (1912).)

Respondent claims to find a different viewpoint in Seymour's treatment of the 1892 Colville Act (Respondent's Brief at 20), but Respondent's position is inexplicable. The 1892 Colville Act contained language of clear intent. The statute said:

> "All the following described tract or portion of said Colville Reservation...be, and is hereby, vacated and restored to the public domain, notwithstanding any executive order or other proceeding whereby the same was set apart as a reservation for any Indians or bands of Indians... ."

Seymour used this language to show that the statute extinguished the North Half of the Colville Reservation. (368 U.S. 351 at 354-355.)

Respondent also relies on four lower court cases to support his contention that clear language is not required to end reservation status: United States v. LaPlant, 200 Fed. 92 (S.D. 1911); Tooisgah v. United States, 186 F.2d 93 (10th Cir. 1950); DeMarrias v. South Dakota, 206 F.Supp. 549 (S.D. 1962), aff'd 319 F.2d 845 (8th Cir. 1963); and Ellis v.

Page, 351 F.2d 250 (10th Cir. 1965). Respondent's reliance on these cases is misplaced, however.

Ellis v. Page, supra, for example, involved an agreement between the Government and the Indians which provided that the tribes occupying the reservation would

> "cede, convey, transfer, relinguish [sic], and surrender, forever and absolutely, without any reservation whatsoever, express or implied, all their claim, title, and interest, of every kind and character, in and to the lands embraced [within the reservation.]"

The court described those words as "unequivocal" (351 F.2d 250 at 252) and said

> "In treaty parlance they are as appropriate to disestablish the reservations as the Congressional words 'vacate and restore' employed in the 1892 Act to disestablish a part of the Colville Reservation."

In other words, the Tenth Circuit based its decision on what it considered language showing a clear intent to terminate.[3]

3. Whether the language was actually as clear [footnote continued on next page]

Tooisgah, supra, and DeMarrias, supra, were based on agreements that are indistinguishable from the one considered in Ellis.

The approach adopted by the Ellis court is exactly what Petitioner believes is required here. To terminate a reservation a statute must use a phrase such as "vacated and restored to the public domain" (Act of July 1, 1892, 27 Stat. 62), "shall not be retained for purposes of Indian reservations" (Act of April 8, 1864, 13 Stat. 29), or "reservation is hereby discontinued" (Act of July 27, 1868, 15 Stat. 221). United States v. Celestine, supra, 215 U.S. 278, 290-291, requires nothing less.

Finally, United States v. LaPlant, supra, is of no help to Respondent, as it was disapproved in Putnam v. United States, 248 F.2d 292, 295 (8th Cir. 1957), and overruled sub silentio in United States ex rel Condon v. Erickson, supra, 344 F. Supp. 777.

as the court believed is not free from substantial doubt. (See Leech Lake Band of Chippewa Indians v. Herbst, 334 F.Supp. 1001 (Minn. 1971); United States ex rel Condon v. Erickson, 334 F.Supp. 777 (S.D. 1972); cf. Ash Sheep Co. v. United States, 252 U.S. 159, 163-166 (1920); United States v. Brindle, 110 U.S. 688, 690-693 (1884).)

II

THE 1892 HOOPA EXTENSION ACT CLOSELY RESEMBLES THE 1906 STATUTE WHICH SEYMOUR HELD HAD NO EFFECT ON THE RESERVATION STATUS OF THE COLVILLE RESERVATION'S SOUTH HALF. THE 1892 HOOPA EXTENSION ACT IS SIGNIFICANTLY DIFFERENT FROM THE 1892 LAW WHICH SEYMOUR HELD HAD DISCONTINUED THE NORTH HALF OF THE COLVILLE RESERVATION

A. The 1892 Hoopa Extension Act Did Not Restore Lands To the Public Domain, Because, Unlike The 1892 Colville Act, The Hoopa Extension Law Contained No Express Language To That Effect While, Like The 1906 Colville Act, The Hoopa Extension Statute Made The Affected Indians Exclusive Beneficiaries Of Land Sale Proceeds.

The primary ground for the decision in Seymour v. Superintendent, supra, 368 U.S. 351, was that the 1892 Colville Act expressly "vacated and restored to the public domain" the North Half of the Colville Reservation whereas the 1906 Colville Act contained no such language concerning the South Half. Section I of this brief explains why United States v. Celestine, supra, 215 U.S. 278, required such express language to terminate Colville's North Half.

Despite Celestine and although the 1892 Hoopa Extension Act contains no phrase vacating or restoring unallotted lands to the public domain, Respondent contends that the 1892 Hoopa Extension Act and the 1892 Colville Act had the same "effect." The reason, argues Respondent at page 16 of his brief, is that under the 1892 Colville Act homesteaders could become private owners of unallotted lands under the general land laws of the United States. But, the 1906 Colville Act (which Seymour held did not restore land to the public domain) also authorized homesteaders to become private owners of unalloted land under the general land laws.

In addition, the 1892 Hoopa Extension Act required the United States to use any land sale proceeds solely for the affected Indians' benefit. That arrangement is, to quote Respondent, "essentially similar" to the 1906 Colville Act provision that sales proceeds would be deposited in the Treasury to the Colville Indians' credit. The 1892 Hoopa Extension arrangement is distinctly different, however, from the 1892 Colville Act which provided that proceeds from the sale of unallotted land were available "for

such...public use as Congress may make."[4]

Respondent believes that little significance should attach to who receives the land sale proceeds (Respondent's Brief at 17-18); but this Court thought otherwise in Seymour v. Superintendent, supra, 368 U.S. 351, at 355-356. Seymour held that under the 1906 Colville Act the Government was selling land and retaining proceeds only as the Indians' trustee. Under the 1892 Colville Act, the United States was selling land for its own account and the proceeds belonged to the Government. In other words, under the 1892 Colville Act the Government was selling public domain, and under the 1906 Colville Act the United States was selling Indian land.

Therefore, as the provisions for the disposition of proceeds in the 1892 Hoopa Extension Act and the 1906 Colville Act are "essentially similar," the effect of the 1892 Hoopa Extension Act was to authorize a sale of Indian lands. The effect was not the same as if that law

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4. The 1892 Colville Act also allowed the Interior Department to expend the proceeds for the Indians' needs until Congress acted.

had expressly vacated unallotted lands and expressly restored them to the public domain.[5]

B. The 1906 Colville Act And The 1892 Hoopa Extension Act Do Not Have Different Meanings Just Because Of Somewhat Different Verbiage.

Unable to find words of express termination in the 1892 Hoopa Extension Act, Respondent's Brief points (at pages 4, 14-15) to a collection of gossamer distinctions between the phraseology of the 1892 Hoopa Extenstion Act and the 1906 Colville Reservation Act.

For example, the 1906 Colville Act authorizes homesteading of "unallotted" or "surplus" lands. The 1892 Hoopa Extension Act, on the other hand, authorizes homesteading of "all lands" except those which are allotted or reserved for Indian vil-

5. The Respondent seeks to bolster his position with a statement from a brief which the United States filed in another proceeding. (Respondent's Brief at 16-17.) While the weight to be accorded such a statement is dubious, the Court is undoubtedly aware that the United States no longer holds that position. (See the Memorandum For the United States As Amicus Curiae, filed in this proceeding.)

'ages. Obviously, this minor language difference is of no significance. The Standing Rock Reservation Act of February 14, 1913 (37 Stat. 675) is, in this regard, indistinguishable from the 1892 Hoopa Extension Act, yet the South Dakota Supreme Court had no difficulty equating the 1913 Standing Rock Act with the 1906 Colville Act. (State v. Molash, 199 N.W. 2d 59 (1972).)

Similarly unmeritorious is Respondent's effort (at page 4 of his brief) to claim that the 1892 Hoopa Extension Act was abolishing a big reservation and creating many new smaller reservations by "reserving" land for allotments and villages. The word "reserve" was used as in common parlance, not to create new reservations. Public domain allotments--which is what Respondent claims the 1892 Hoopa Extension Act provided for--are not reservations. (Compare 18 U.S.C. §1151(a) with 18 U.S.C. §1151(c).) Respondent's interpretation of "reserve" is also impossible to reconcile with Seymour's interpretation of the 1906 Colville Act. Section 7 of that law "reserved" lands for communal purposes.

Respondent's Brief also points out (at pages 2, 14-15) that the 1906 Colville Act described its affected area as "diminished Colville Reservation," while the 1892 Hoopa Extension Act describes its affected area not as "reservation" but as "lands embraced in what was [the] Klamath River Reservation." Several reasons for the Hoopa Act's description are possible. (See Petitioner's Opening Brief at 14-16.) Those reasons do not, however, include the abolition of the Klamath River Reservation by the 1892 statute, for the Klamath River Reservation had ceased to exist no later than 1876. (Petitioner's Opening Brief at 12-14.) However, the lands of the former Klamath River Reservation were added to the Hoopa Valley Reservation in 1891 (Petitioner's Opening Brief at 8, 14); and thus, the phrase "lands embraced in what was [the] Klamath River Reservation" was a convenient way of indicating which part of the Hoopa Square and Extension non-Indian settlers could homestead. By contrast, all of the "remaining Colville Reservation" was opened to settlement by the 1906 Colville Act.

In summary, it is hardly surprising

that a statute enacted in 1892 does not read exactly like one enacted in 1906. What is significant is that the 1892 Colville Reservation Act expressly vacated and restored the North Half of that reservation to the public domain, while the 1892 Hoopa Extension Act, adopted only two weeks earlier, contains no such language.

III

CONGRESS DID NOT CONSIDER THE LOWER TWENTY MILES OF THE HOOPA EXTENSION DE FACTO TERMINATED PRIOR TO THE ACT OF JUNE 17, 1892, NOR DID CONGRESS INTEND THAT LAW TO CAUSE A DE JURE TERMINATION

Respondent's brief attempts to show (at pages 2, 5-9) that "Congress did not regard the area [i.e., the lower twenty miles of the Hoopa Extension] as a de facto reservation prior to the act" of June 17, 1892. From that premise respondent argues that "Congress approved the bill apparently because it did not expect these lands to continue as a reservation." Both the premise and the conclusion are erroneous.

A. The Legislative History Of The Act of June 17, 1892 Does Not Show That Congress Regarded The Affected Area As De Facto Terminated Before The 1892 Statute.

Respondent's premise rests upon a misreading of the House Committee report and remarks in the House and Senate. The "abandoned" reservation referred to in Respondent's excerpted version of the House Report is the old Klamath River Reservation, not the Hoopa Extension. This can be ascertained by reading the entire report. Representative Geary's "abandoned" reservation must also be the Klamath River Reservation, since he says it was abandoned in 1861--thirty years before the Hoopa Extension was created. Abandonment of the Klamath River Reservation does not show that the 1891 Hoopa Extension was abandoned in early 1892.

Senator Fulton did argue: "It is not practically an Indian reservation. It never has been used for that purpose." (23 Cong. Rec. 3919.) And the House report and Congressman Geary made a few similar statements.

Congress' actions[6] belie those statements, however, and make Senator Fulton and his allies appear only overeager sup-

6. See also the remarks of Senator Cockrell (23 Cong.Rec. 3918-3919 (May 4, 1892)) and of Senator Pettigrew, who, unlike Senator Fulton, was on the bill's conference committee (23 Cong.Rec. 4245 (May 13, 1892)).

porters of non-Indian settlers. The Senate and later the whole Congress rejected the House passed bill which would have authorized removal of Indians from the lower twenty miles of the Extension. (Compare 23 Con.Rec. 1599 with 23 Cong.Rec. 3918.) In place of the House bill, Congress substituted the present law which gave Indian residents of the lower twenty a preferential right to allotments, provided for the preservation of Indian villages and settlements, and directed the Secretary of the Interior to apply any land sale proceeds towards the Indians' education and maintenance.

The real purpose behind the Act of June 17, 1892, was--as explained in Petitioner's Opening Brief--to sell for the Indians' benefit those parcels which were surplus to the Indians' needs and those parcels which non-Indians had settled in good faith. The carrying out of that intent was not at all inconsistent with continued reservation status for the area. Contrary to Respondent's unsupported and inaccurate statements on the matter,[7] the 1892 Act did not

7. Respondent's Brief asserts (at pages 9 [footnote continued on next page]

wipe out traditional Indian life on the lower twenty miles of the Extension. Instead, Indians were allotted nearly 40

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and 12) that after the 1892 act "many of the Indians left this area," "were relocated," and "the Klamath River tribe became widely scattered." Respondent also says (at page 10) that "the practical effect of the 1892 act was to bring to a halt any federal supervision of most of the lands...[and to discontinue] traditional reservation functions in the lower area."

None of those supposed facts are supported by the record in this case. Some, such as the asserted end to federal supervision, are supported by no authority whatsoever and are contradicted by a Superintendent of the Hoopa Indian Agency in testimony before Congress (A.14). Other statements are rested on a meaningless bit of dicta in Elser v. Gill Net Number One, 246 Cal.App. 2d 30, 34 (1966).

Still other of Respondent's assertions are taken from an Interior Department decision (65 I.D. 59 (1958)), which is exceedingly hostile to the Yurok (or lower Klamath River) Tribe. The May 22, 1972 commissioner's report in Jessie Short v. United States, Ct.Cl. No. 102-63, describes that Interior Department decision as full of errors. (Id. at 103.) The commissioner's thoroughly considered and unbiased findings completely contradict the Interior Department decision. (See text, infra, and footnotes 8 and 9.)

Furthermore, the relocation conjured up by Respondent would be inconsistent with Congress' decision deleting "removal" authority from the Act of June 17, 1892.

percent of the land and also settled in eight villages.[8] In 1932 the Bureau of Indian Affairs showed more Indians living on the lower twenty than on either the Hoopa Square or the rest of the Extension;[9] and the Bureau considered the Indians living on all three parts of the reservation as being under its jurisdiction.[10] Those facts are scarcely consistent with de facto termination.

B. The Legislative History Does Not Show The Required Clear Congressional Intent To De Jure Terminate The Lower Twenty Miles of The Extension.

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8. The Commissioner's May 22, 1972, report in Jessie Short v. United States, supra, Ct.Cl. No. 102-63, found that 161 Indian allottees received 9,762 acres of allotments in 1892 on the lower twenty miles of the Extension. (Id. at 57.) The 9,762 acres would be nearly 40 percent of the lower twenty's 25,000 acres. The 161 allottees may not have included minor children and certainly did not include Indians living in villages (Id. at 111).

9. The comparison is based on a BIA census. The census is quoted at page 62 of the commissioner's report in Jessie Short v. United States, supra. The exact numbers were 608 Indians on the lower twenty as against 373 on the rest on the Extension and 561 on the Hoopa Square.

10. Single Appendix at 14.

Even if Congress considered the lower twenty miles of the Extension de facto terminated before the 1892 law, the area would have remained a de jure reservation under the Executive Order of October 16, 1891, until either the President or Congress affirmatively changed that status. The legislative history does not reflect the clear intent which United States v. Celestine, supra, 215 U.S. 278, 290-291, requires to effect such a change.

Respondent points to the phrase "lands embraced in what was [the] Klamath River Reservation" as showing the intent to terminate. (Respondent's Brief at 8.) That language is patently irrelevant, however, because Congress knew that the Klamath River Reservation had already been de jure dead for a long time. (H.Rpt.No. 161, 52d Cong., 1st Sess.)

Rather than showing a clear intent to terminate the lower twenty miles of the Hoopa Extension, the legislative history shows that Congress did not once mention the Extension and probably did not know of its existence. (See Petitioner's Opening Brief at 18.) Under such circumstances, Congress could hardly have intended to de jure terminate the area. (Cf. Menominee Tribe of Indians v. United States,

101 Ct.Cl. 10, 21 (1944).)

IV

THE RELEVANT AND AUTHORITATIVE MAPS SUPPORT RESERVATION STATUS FOR THE LOWER TWENTY MILES OF THE HOOPA EXTENSION

Petitioner's Opening Brief referred (at page 24) to a map in the 1892 Report of the Commissioner of Indian Affairs. The map showed both the lower and upper Hoopa Extension as reservation areas. Respondent points out that this map was probably prepared before June 17, 1892, because the map shows the Colville Reservation's North Half, which was discontinued by the Act of July 1, 1892.

By 1897, however, BIA mapmakers had caught up with Congress. The 1897 Commissioner's Report shows only an outline of Colville's North Half; the South Half is colored in accordance with the map's key. (Report of the Commissioner of Indian Affairs in Annual Reports of the Department of the Interior for the Fiscal Year Ended June 30, 1897.) In the 1898 report not even an outline of the North Half is left. (Report of the Commissioner of Indian Affairs in Annual Reports of the Department of the Interior

for the Fiscal Year Ended June 30, 1898.) In both the 1897 and 1898 maps the lower twenty miles along the Klamath continue to show as a reservation area.

Respondent's position is not strengthened by President Roosevelt's 1909 Proclamation placing parts of the Hoopa Valley Reservation into the Trinity National Forest unless allotted or reserved by the Interior Department. (The proclamation is Appendix A to Respondent's Brief.) First, the proclamation states that the lands shown on its maps "constitute a part [not all] of the Hoopa Valley Indian Reservation." Second, a diagonal line in the proclamation's maps has no bearing on this case. Although Respondent describes that line as the Extension's northern boundary, the line does not correspond to what the other maps in Respondent's own brief show as the northern end of the reservation. Those other maps all show the Extension extending into Town 12 North of Range 2 East, while the diagonal line only extends into Town 11 North. Even the smaller of the proclamation's two maps (labeled part 2 of the diagram) shows the reservation as extending past the diagonal line. The line to which Respondent attaches so much sig-

nificance appears to be nothing more than the northern limit on issolated national forest tracts within the reservation. (See the map labeled part 2 of the diagram.) Finally, the 1909 Proclamation is not contemporaneous with 1892.

The other maps on which Respondent relies (Appendices B, C, and D to Respondent's Brief) were not prepared by the Bureau of Indian Affairs--the federal agency charged with managing Indian Affairs--and are in conflict with the BIA's 1897 and current maps. Respondent's maps also conflict with the National Atlas' map of federal lands (Sheet 272). Respondent admits as much (at page 24 of his brief) and urges this Court to disregard the current BIA map and the National Atlas because they were published after this lawsuit began. The Interior Department is not a party to this lawsuit, however, so no cartographic boot-strapping is involved. In any event, Sheet 272 of the National Atlas shows that it was compiled in 1968, more than one year prior to the confiscation of Petitioner's fishing nets.

V

JESSIE SHORT v. UNITED STATES PROVIDES A SIGNIFICANT INTERPRETATION OF THE ACT OF JUNE 17, 1892

The May 22, 1972, report of the commissioner in Jessie Short v. United States Ct.Cl. 102-63, holds:

> "[T]he act of 1892...and the more recent legislative and executive postscript dealings with the 'Klamath River Reservation'...were not intended or understood by their draftsmen and makers to have any bearing on the rights of the residents of the Hoopa Valley Reservation as extended by the 1891 executive order." (Emphasis added.) (Id. at 108-109.)

The report then concludes that Indian villages on the lower twenty miles of the Extension are on the Hoopa Valley Reservation. (Id. at 111.)

The commissioner's rulings are not merely assumptions, as Respondent would have this Court believe. (Respondent's Brief at 21.) The commissioner's report is a comprehensive 117 page study of the

legal status of the Hoopa Reservation and its Extension. Just the relationship between the 1891 Executive Order and the 1892 Act takes 22 pages (34-52, 106-109). The Commissioner's report cannot be ignored in this proceeding.

VI

THE ACT OF MAY 19, 1958, AFFIRMS THE EXISTENCE OF A RESERVATION ON THE LOWER TWENTY MILES OF THE HOOPA EXTENSION

Petitioner's Opening Brief pointed out (at page 18-19) that the Act of May 19, 1958 (72 Stat. 121) restored to tribal ownership land "on" the "existing" Klamath River Reservation, i.e. the lower twenty miles of the Hoopa Extension. Respondent notes that the statute also "added" the land to the reservation. (Respondent's Brief at 18-19.) Thus, as respondent points out the law is not internally consistent.[11]

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11. Respondent also claims that the 1958 act is inconsistent with the 1953 grant of state jurisdiction over Indian country in 18 U.S.C. §1162. If the lower twenty miles of the Hoopa Extension were not terminated in 1892, however, the area was Indian country in 1953; and if the Indians had federally recognized fishing rights on the lower twenty, 18 U.S.C. §1162 gave the state no jurisdiction over Indian [footnote continued on next page]

should be ignored, however. Ambiguous laws are to be construed in the Indians' favor. (Squire v. Capoeman, supra, 351 U.S. 1, 6-7; Alaska Pacific Fisheries v. United States, supra, 248 U.S. 78, 89 (1918); Choate v. Trapp, supra, 224 U.S. 665, 675 (1912).)

VII

INDIAN CONTROL OF FISHING ON THE LOWER TWENTY MILES OF THE HOOPA EXTENSION WILL NOT JEOPARDIZE THE KLAMATH RIVER FISHERY

The effect of gill nets on the Klamath River fishery is legally irrelevant in this case. If treaties, statutes, regulations, or agreements afford Yuroks fishing rights on the lower twenty miles of the Hoopa Extension,[12] then Yurok fishing there (see Petitioner's Opening Brief at page 5, fn.1). The 1958 act would change nothing by recognizing the continuing existence of the reservation.

12. Whether Yurok Indians have fishing rights on the lower twenty miles of the Extension is not an issue in this proceeding. (See Petitioner's Opening Brief at 5, fn.1.)

In particular, and contrary to Respondent's Brief (at 10), this case will not decide whether Indians have a right to hunt and fish on privately owned lands within the Extension. Petitioner has asserted no such right. He had no intent to go on private lands; the 1964 flood on the Klamath River simply [footnote continued on next page]

fishing in that area will be under federal and tribal control and will not be subject to state law. (Metlakatla Indian Community v. Egan, 369 U.S. 45 (1962).)[13]

An absence of state control would not imperil the Klamath River fishery, however. Regulation would simply pass

made it difficult for him to tell where him mother's allotment left off and Simpson Timber's land began. (A.33.) The case against Petitioner is based on gill-netting (A.5) not on trespass.

Petitioner is not even a plaintiff in Blake v. Arnett, No. C-72-2140 (N.D. Cal.), which seeks judicial recognition of two Yurok Indians' right to cross private land in order to exercise fishing rights in the Klamath River. In any event, Respondent's Brief is open to serious question when it says (at page 11) that the Blake plaintiff's contention is inconsistent with a Congressional intent to give Hoopa Extension homesteaders the same land rights as homesteaders of non-Indian lands. (See California Constitution, Art. I, §25 and Art. XV, §2; Gion v. City of Santa Cruz, 2 Cal. 3d 29 (1970); Confederated Salish and Kootenai Tribes v. Vulles, 437 F.2d 177 (1971).)

13. Puyallup Tribe v. Department of Game, 391 U.S. 392 (1968) suggests no different result. Puyallup upheld state regulation for conservation purposes only of off-reservation Indian fishing.

from one authority (California) to two others (the United States and the reservation government).

Of course, the new authorities might adopt different regulations than the old one has. Indian gill netting might be officially sanctioned. After all, Yuroks have always fished the lower Klamath River with dip nets,[14] gill nets,[15] and seines (A.37, 39-40); and fish is a staple of the Yurok diet (A.34).[16] On

14. The traditional Yurok dip nets were very substantial affairs, not the hand held nets which Yuroks may use under California Fish and Game Code §7155. (A.37.) Section 7155 is no substitute for Indian control of fishing on the lower twenty miles of the Hoopa Extension.

15. Respondent's Brief at 27 states, "Undisputed evidence at the trial shows that the use of gill nets...are [sic] particularly harmful to salmon." That statement is incorrect. The trial judge refused to hear any evidence on the effects of gill nets. (A.27-28.) He ruled that such evidence would be irrelevant. (A.27-28.)

The judge did take judicial notice that gill nets are particularly harmful to salmon. Petitioner agrees that gill nets kill fish; but fish thrived in the the Klamath River when only Indians fished there, and it is undisputed that the Yuroks fished with gill nets (see footnote 16 and the accompanying text).

16. Respondent admitted all the facts in this sentence by adopting the statement [footnote continued on next page]

the other hand, non-Indian fishing might be banned altogether (see 18 U.S.C. §1165); for as the trial judge said, "[M]an is very harmful to salmon, particularly the white man."

Indians maintained the Klamath River fishery before the white man came on the scene; and working with the federal government, the Indians could and would do so once again. The state is not the only agency capable of conserving the lower Klamath River fishery.

CONCLUSION

The Act of June 17, 1892, did not terminate the lower twenty miles of the Hoopa Extension. This court should reverse the judgment below and remand for further proceedings consistent with the reservation status of the land where Raymond Mattz's nets were seized.

Dated: March 9, 1973

Respectfully submitted,

LEE J. SCLAR
BRUCE R. GREENE

---

of the case in Petitioner's Opening Brief. (Respondent's Brief at 1.)

ROBERT J. DONOVAN
WILLIAM P. LAMB
CALIFORNIA INDIAN
LEGAL SERVICES

By: _____
Lee J. Sclar

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SECRETARY
WASHINGTON 25, D. C.

APR 15 1961

Dear Dick:

Thank you very much for your letter of March 8, setting forth the Association on American Indian Affairs' analysis of the present status of H. Con. Res. 108.

I most certainly agree that resolution, whatever it meant, died with the 83rd Congress and is of no legal effect at the present time. It is my belief that further discussion of it is futile and that we should be devoting ourselves instead to the opportuni we now have to develop programs with the Indians which will help them improve their lives.

Sincerely yours,

Secretary of the Interior

Mr. Richard Schifter
Office of General Counsel
Association on American Indian
Affairs, Inc.
1700 K Street, N. W.
Washington 6, D. C.

APPENDIX A

ERRATUM IN PETITIONER'S OPENING BRIEF

The quote from Jessie Short v. United States on page 15 of Petitioner's Opening Brief is from page 108 of the May 22, 1972, report of the Court of Claims Commissioner.